No. 14618

In the United States Court of Appeals for the Ninth Circuit

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

BEKINS VAN & STORAGE COMPANY, A CORPORATION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

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MAY 1955.

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Central Division, dismissing an action by the Secretary of Labor, filed under Section 17 of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by c. 736, 63 Stat. 910, 29 U. S. C. 201, *et seq.* to restrain appellee from violating Sections 15 (a) (2) and 15 (a) (5) of the Act.[1] After a full hearing, the court made "Findings of Fact and Conclusions of Law" (R. 33–49) and en-

[1] The pertinent statutory provisions are printed in full in the Appendix, *infra*, p. 26.

tered final judgment on October 18, 1954 (R. 51). Notice of appeal to this Court was filed on December 15, 1954 (R. 51–52).

The district court had jurisdiction to entertain the action under 29 U. S. C. Section 217, as well as under 28 U. S. C. Sections 1337 and 1345. This Court has jurisdiction to determine the appeal under 28 U. S. C. Sections 1291 and 1294 (1).

STATEMENT OF THE CASE

The complaint (R. 3–6) alleges violations of the Act's overtime and record-keeping provisions with respect to employees employed in appellee's Alameda warehouse, located at 825 East Fourth Street (Fourth and Alameda Streets) in the City of Los Angeles, California. The Alameda warehouse and four other warehouses, located at different places in the City of Los Angeles, comprise what is known as appellee's East Los Angeles Division. The sole question raised by this appeal is whether, for purposes of the "retail or service establishment" exemption provided in section 13 (a) (2) of the Fair Labor Standards Act, the Alameda warehouse constitutes a single establishment or whether, as the trial court held, appellee's whole East Los Angeles Division, consisting of five separate warehouses and a central office, constitutes a single establishment (R. 19).

There is no dispute as to the essential evidentiary facts. Appellee is engaged in the van and storage business, handling both household and commercial goods (R. 10). The largest storage company in the

country,[2] appellee advertises itself as having "offices or agents in all principal cities" (R. 76a). In California, it owns and operates 36 warehouses, at each of which employees are regularly engaged in handling, packing and storing goods substantial quantities of which have been, and are being, received from out-of-State points and have been, and are being, handled, packed, shipped, delivered, transported and offered for transportation to out-of-State points (Fdg. 5, R. 35). These warehouses, located in various parts of the State, are grouped into 19 divisions or districts (R. 11, 36), each with a main office patterned after appellee's general office (R. 36, 61–62). The offices for the various divisions perform all management, executive and administrative functions for the warehouses within their jurisdiction (R. 42–43) and are responsible to appellee's general office or top management for the successful operation of such warehouses (R. 69).

As stated above, appellee's East Los Angeles Division consists of five warehouses. These warehouses are all in the central part of the City of Los Angeles, but at different locations. The main office and one warehouse of this division is at 1335 Figueroa Street, hereinafter called "Figueroa." The four other warehouses, known respectively as "Grand Avenue," "Crenshaw," "Wilshire" and "Alameda," are located at 3625 South Grand Avenue, 4174 West Pico Street, 116–122 South Western Avenue, and Fourth and Alameda Streets. Alameda is approximately

[2] Appellee so described itself in its trial court brief.

1¾ miles from Figueroa, and the others are from 1.8 to 3.5 miles from Figueroa (Fdg. 10, R. 37–38; Stip. R. 11).[3]

Each of the warehouses in the East Los Angeles Division contains warehouse space, loading docks, packing equipment and yard area for the servicing and operation of motor vans and trucks (R. 38).[4] Two of them—Alameda and Grand Avenue—are equipped with a railroad siding (*id.*). Alameda, the one in issue here, is a five-story, reinforced concrete building, containing approximately 60,000 square feet of space. It is located in the heart of the industrial area of Los Angeles on a spur track of the Southern Pacific Railroad. Like all of appellee's other warehouses, it has truck and van loading docks, and, in addition, railroad loading docks and five storage areas (R. 12, 38, 129). Also, like appellee's other warehouses, Alameda handles, packs, moves and stores household goods (R. 12). However, Alameda does considerably more commercial warehousing than do the others (R. 75–76). In fact, this phase of its business is so great in volume that Alameda, standing alone, cannot meet the percentage tests for exemption under Section 13 (a) (2) of the Act (R. 18, 34).

Though there is some interchange of employees between the various warehouses in the East Los Angeles Division, Alameda has approximately 11 regular em-

[3] See Government Ex. 2 (transmitted to this Court in its original form) which is a map of the City of Los Angeles showing the location of each of these warehouses.

[4] See Government Ex. 1 (transmitted to this Court in its original form) which is a group of photographs of the warehouses in the East Los Angeles Division.

ployees of its own, including its own warehouse foreman (Fdg. 12, R. 39; Stip. R. 13–14), who is admittedly an executive employee within the exemption as defined by applicable regulations, 29 C. F. R. 514.1 (Fdg. 12, R. 39; Stip. R. 17). He supervises the other warehouse employees, opens and closes the building, is responsible for fire prevention measures, supervises and works on loading and unloading of freight cars, reports incompetent work to supervisors, selects locations in the warehouse for storing goods, and performs minor clerical work in connection with the receipt and delivery of stored goods (Fdg. 13, R. 40; Stip. R. 13–14).

Two of Alameda's 11 regular employees are office workers whose duties consist of preparing documents used in connection with the receipt and delivery of storage lots, preparing warehouse receipts, maintaining stock cards on commercial storage, answering telephones and carrying on other clerical work (Fdg. 13, R. 39; Stip. R. 13). Of the remaining eight employees, two are working foremen and six are warehousemen whose duties consist of loading and unloading freight cars and trucks, crating and packing goods, and driving and helping on moving jobs (Stip. R. 17).

Alameda is thus equipped to, and does, perform practically all of the physical operations involved in running a storage warehouse. As stated above, central management for it and the other warehouses in the East Los Angeles Division is furnished by the division's main office. This office also purchases the supplies which the warehouses use. These supplies are

bought in large lots and stored in one or another warehouse until needed. In addition, the division office operates a shop where the automotive equipment used by the warehouses is repaired. This shop is located at Figueroa, which houses both the division office and appellee's general office (Fdg. 25, R. 45–46).

The East Los Angeles Division office is composed of a manager, an assistant manager, a superintendent, an accountant, a dispatcher, a sales manager, and a storage manager (Fdg. 17, R. 42–43). Being central office employees, these individuals perform duties in their respective fields for all five warehouses, except that the foreman at each warehouse is generally responsible for storage operations (Fdg. 13, R. 40). Thus, in addition to the functions stated above, the Division office people keep the payrolls (Fdg. 24, R. 45), handle all the accounting work (Fdgs. 22, 23, 24, R. 44–45), do the banking (Fdg. 24, R. 45), and carry on an active sales program (Fdg. 19, R. 43). The records, including payrolls and financial statements, are kept for the warehouses as a group and not broken down or classified in any manner for particular ones (Fdg. 23, R. 45). According to appellee's assistant controller, the records are kept in this manner because "it would take more accounting personnel and it would be prohibitive cost-wise" (R. 87) to keep separate records for each warehouse.

During the trial appellee offered a great deal of evidence concerning its policies and historical background. This evidence shows that ever since the company was founded in 1895 (at which time operations were conducted in a single rented building (R.

126)), it has endeavored to keep up with the constantly growing population of California by building or acquiring new warehouses in or near residential areas as they developed (R. 35–36, 60–61).

Alameda, the first company-owned Bekins warehouse and the one in issue here, was built in 1898 to serve the prosperous residential area of Los Angeles which was then around Fourth and Alameda Streets (R. 40, 126). By 1907, however, the nice residential area of the city had started to "move out South Figueroa Street and west from there" (R. 127). The company thereupon acquired the property on which Figueroa is now located. When that warehouse was built, it was in "the leading residence area in Los Angeles" (R. 40–41). This is not true today, and Figueroa, like Alameda, no longer has the demand for the storage of household goods that it once did (R. 130). According to Mr. Elliott, who is a member of appellee's board of directors, vice-president and also manager of the East Los Angeles Division (R. 111), Figueroa is being advertised and pushed as an "office record center so that the various companies in the downtown area and adjacent area to Figueroa Street can store their dead office files and records" (R. 130). Also, space in it is rented to "customers who need blocks of five thousand foot space" (*id.*).

Crenshaw was built in 1928 or 1929, and "there again it was to follow the residential development of the city" (R. 127). Wilshire was acquired by purchase in 1931 to serve the then "prosperous Wilshire residence area" (R. 41). Now, however, substantial

portions of these two warehouses are leased to a furniture dealer for the sale of furniture (R. 42). Grand Avenue, the fifth warehouse in the East Los Angeles Division, was acquired in 1942 "to meet unusual requirements for space for storage of household goods resulting from World War II" (R. 41).

All of appellee's operating employees, including those at Alameda, are members of the International Brotherhood of Teamsters Union (R. 47). Their collective bargaining agreement does not provide for the payment of overtime compensation for weekly hours between 40 and 48 (*id.*) and appellee has paid for such hours at straight time rates only (R. 17). With respect to its wage and hour records, appellee has failed to show the "hours worked in each week or wages paid on a weekly basis" (R. 18).

On the basis of this record, the trial court held that appellee's whole East Los Angeles Division, consisting of Alameda, four other warehouses and a central office, constitutes a single establishment within the meaning of the exemption contained in Section 13 (a) (2) of the Fair Labor Standards Act. In reaching this conclusion, the trial court theorized that even though appellee had successfully adjusted its business in the East Los Angeles Division to meet changing conditions, it "could carry on the operations there as well or better if all of its business were carried on in a single large building instead of five buildings geographically separated" (R. 42). Judgment, therefore, was entered for appellee and the complaint dismissed (R. 50, 51).

SPECIFICATION OF ERRORS

1. The trial court erred in making the findings, embodied in Findings of Fact Nos. 2 and 3, that appellee's whole East Los Angeles Division is a single "retail or service establishment" within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act, and that all of the employees of that division, including those employed at the Alameda warehouse, are thus exempted from the Act.

2. The trial court erred in making Finding of Fact No. 16 and Conclusions of Law Nos. 1, 2 and 3.

3. The trial court erred in failing to hold that appellee's Alameda warehouse is an "establishment" for purposes of the "retail or service establishment" exemption provided in Section 13 (a) (2) of the Fair Labor Standards Act.

4. The trial court erred in dismissing the complaint and in failing to grant the injunction prayed for in the complaint.

SUMMARY OF ARGUMENT

The holding of the court below that Bekins' Alameda warehouse is not an "establishment" but part of an "establishment" exempt from the Act, is clearly erroneous on both the law and the facts. It is plainly in conflict with the controlling decision of the Supreme Court in *Phillips* v. *Walling,* 324 U. S. 490, 496, holding an "establishment" to mean a "distinct physical place of business," and with the decisions of other Courts of Appeals.

The only distinction that might be drawn between the instant case and *Phillips* is that in *Phillips* the

chain consisted of grocery stores whereas here it is van and storage warehouses, but this is immaterial, for the *Phillips* principle is applicable to any multi-unit enterprise.

The facts show conclusively that Alameda is a "distinct physical place of business." Its physical location and attributes, the functions of its employees and the nature of its operations compel this conclusion.

The trial court, however, ignored *Phillips* and applied what it called a "rule of reasonableness" which is clearly without precedent and in direct conflict with the rule of narrow construction applicable to exemptions from the Act. Applying its "rule of reasonableness" led the court to hold that the central office employees are within the 13 (a) (2) exemption and that appellee's organizational structure was determinative of the exemption issue. Since the Supreme Court's decision in *Phillips,* it has been settled that central office employees of chain systems are not within the exemption and that organizational structure is irrelevant in determining what is an "establishment."

Apparently the court below accepted the rationale of *Burhans* v. *Montgomery Ward & Co.,* 110 F. Supp. 184 (S. D., N. Y., 1952) for it theorized that appellee's East Los Angeles Division "could carry on the operations there as well or better if all of its business were carried on in a single large building." (Fdg. 16, R. 42). Such theorizing has been expressly rejected by this Court in *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101, 107. Moreover, the rationale of the

Burhans decision is in no wise applicable here for the facts are completely different. In fact, the trial court's own findings (Fdg. 15, R. 40–41) and its oral opinion (R. 140) clearly contradict the appropriateness of *Burhans* and the theoretical finding in Finding No. 16.

The *Phillips* doctrine is not limited, as appellee contends, to enterprises that operate chains of retail stores. It has been applied to a variety of chain-system organizations. This has been the consistent administrative position and it has been approved by both the Supreme Court and the Congress. The legislative history of the 1949 Amendments to Section 13 (a) (2) shows that Congress explicitly approved the *Phillips* doctrine and that it intended no change in the Supreme Court's definition of "establishment."

ARGUMENT

Appellee's Alameda Warehouse is a separate "establishment" which is not a "retail" one within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act

Section 13 (a) (2) of the Act, the exemption here involved, reads as follows:

> The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized

as retail sales or services in the particular industry.

Concededly, appellee's Alameda warehouse does not meet the percentage tests prescribed by this section for exemption. The lower court, however, regarded this as immaterial, because, in its view, Alameda is not an "establishment" but part of an "establishment," that "establishment" being appellee's whole East Los Angeles Division. This view, we submit, is contrary to the controlling decision of the Supreme Court in *Phillips Co.* v. *Walling,* 324 U. S. 490 (which was expressly approved by Congress when the Act was undergoing amendment in 1949), and to the numerous decisions of the United States Courts of Appeals in which the doctrine of the *Phillips* case has been applied.

In the *Phillips* case, the "retail establishment" exemption was claimed by a chain enterprise consisting of 49 grocery stores and a separate warehouse and central office which serviced the stores. It was there contended that the stores, warehouse and central office together constituted a single "establishment" for purposes of the exemption. The Supreme Court made short shrift of this contention, stating that the word "establishment" as used in the exemption does not mean an entire business or enterprise but rather "a distinct physical place of business." 324 U. S. at 496. Therefore, although the 49 stores were supervised by the central office which also prepared their payrolls, kept their inventories, ordered their goods, collected their daily cash receipts and deposited the receipts in a single bank account (see *Walling* v.

A. H. Phillips, 50 F. Supp. 749 at 751), they were held to be separate "establishments," distinct and apart from each other and from the central office. 324 U. S. at 496.

Similarly, in the instant case, although Alameda is supervised and serviced in many ways by the main office of appellee's East Los Angeles Division, it is nevertheless a separate and distinct "establishment," as is also true of each of the four other warehouses centrally managed by the East Los Angeles Division office. Under the *Phillips* case, each separate unit of a multi-unit organization is an "establishment" for purposes of the exemption. *McComb* v. *W. E. Wright Co.,* 168 F. 2d 40, 42–43 (C. A. 6), certiorari denied, 335 U. S. 854; *Fletcher* v. *Grinnell Bros.,* 150 F. 2d 337 at 339 (C. A. 6); *Montgomery Ward & Co.* v. *Antis,* 158 F. 2d 948 (C. A. 6), certiorari denied, 331 U. S. 811; *McComb* v. *Wyandotte Furniture Co.,* 169 F. 2d 766, at 769–770 (C. A. 8); *Walling* v. *Goldblatt Bros.,* 152 F. 2d 475, 477–478 (C. A. 7), certiorari denied, 328 U. S. 854; *Mitchell* v. *E. G. Shinner & Co.,* 12 WH Cases 452 (C. A. 7), not yet officially reported; *Armstrong Co.* v. *Walling,* 161 F. 2d 515, 516–517 (C. A. 1); *Fred Wolferman, Inc.* v. *Gustafson,* 169 F. 2d 759 (C. A. 8); *McComb* v. *Casa Baldrich, Inc.,* 80 F. Supp. 869 (D. Puerto Rico, 1948). See also *Walling* v. *American Stores Co.,* 133 F. 2d 840 (C. A. 3), decided prior to *Phillips.*

The above decisions make it clear that the *Phillips* doctrine is not limited to the typical chain-store situation, but applies with equal force to any multi-unit enterprise. Thus, in *McComb* v. *W. E. Wright Co.,*

supra, the doctrine was applied to a coal and building supply organization, consisting of a general office, a warehouse, several yards, a garage to service its trucks, and several retail stores, even though the court found that the "integration of facilities [was] not the conventional chain-store organization where a single warehouse serves multiple retail stores" (168 F. 2d at 42–43). There was, said the Sixth Circuit, "no escape from the application of the *Phillips* decision" (*id.,* at 43). And, in agreeing with the trial court's treatment of the company's outlets, the Sixth Circuit said that "of course, [it had been] right when it considered each * * * as a separate establishment" (*id.,* at 43).

The above decisions also make it clear that the principle of the *Phillips* decision is applicable even in the absence of geographical separateness. If units of a multi-unit organization are distinct from each other, they are separate "establishments" for purposes of the "retail establishment" exemption, even though located in the same building. See *Goldblatt, Armstrong, Wright, Gustafson,* and *Casa Baldrich, supra.*

Plainly, then, the *Phillips* doctrine applies here where there is clear geographical separation between the 36 van and storage warehouses owned and operated by appellee.[5] As to Alameda, this warehouse is

[5] Even the five warehouses comprising appellee's East Los Angeles Division are several miles apart. Thus, the parties stipulated that these warehouses are physically separated from Figueroa, the location of the Division office, by distances from 1¾ miles to 3.5 miles; and it seems fair to say that the distance between Alameda and several of the warehouses in the Division exceeds 3.5 miles. See Govt. Ex. No. 2.

not only distinct from all the others, but it is equipped and staffed to function as a distinct place of business and does in fact so function. Thus, Alameda's five-story building, containing approximately 60,000 square feet of space, is large enough to accommodate large lots of bulky commercial goods. This building, moreover, is located on a railroad siding, and Alameda is equipped with loading docks which enable it to load and unload freight cars which are regularly received from and dispatched to all parts of the United States. Alameda is also equipped with separate docks for the loading and unloading of moving vans and trucks. These facilities, combined with Alameda's location in the heart of the industrial area of Los Angeles from which it derives most of its business, attest to the fact that Alameda is a separately functioning unit.

In addition to its physical attributes, Alameda has 11 regular employees of its own. One of these is a foreman, exempt as an executive employee,[6] who supervises the storage operations and the other employees. His supervisory duties begin when goods are

[6] To be exempt as an "executive", an employee must meet certain tests, one of which is that he devote not more than 20 percent of his time to work of a non-executive type. See 29 CFR 1954 Supp. 541.1, subsection (e). An exception from this test, however, is made in the case of "an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed, *ibid.*" Though this is not spelled out in the record, it would appear that Alameda's foreman comes within the exception as being "an employee in *sole charge of* an independent establishment or a *physically separated branch establishment.*" [Emphasis added.]

received and continue until they are dispatched. Apparently, this employee is also charged with the safekeeping of goods since he is the one responsible for fire prevention measures at Alameda and for opening and closing the building. There is thus present at Alameda responsible management to perform all the "on-the-spot" managerial functions necessary to its storage operations.

Alameda's employees also include two office workers who prepare warehouse receipts and other documents used in connection with the receipt and delivery of storage lots, accept and prepare orders for customers, maintain stock cards on commercial goods, and figure storage rates. In the preparation of warehouse receipts, they perform a vital function incident to the warehousing business. The remaining employees perform all the other skilled and unskilled tasks involved in warehousing, such as loading and unloading freight cars and trucks, crating and packing goods, driving trucks, and helping on moving jobs.

It is thus clear that Alameda is "a distinct physical place of business" and, therefore, an "establishment" for purposes of the Section 13 (a) (2) exemption.

In holding that Alameda is not a "distinct physical place of business," the trial court did not even mention, much less attempt to distinguish, the *Phillips* case, but applied instead what it called a "rule of reasonableness." "If," said the trial court, "the set-up as made by the enterprise of its management, business, and accounting functions, viewed in a reasonable light, constitutes one establishment, then the law should so hold." (R. 143.) But we are here dealing

with an exemption from the Act—the very one, in fact, with respect to which the Supreme Court, in the *Phillips* case, emphasized the narrow construction rule, which this Court had earlier recognized in *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101 (C. A. 9). As this Court said in the *Womack* case: "It is elementary, of course, that the Act is remedial and that persons claiming to come within exemptions therein must bring themselves within both the letter and the spirit of the exemptions, which are subject to a strict construction." (132 F. 2d at 106.)

That the trial court's "rule of reasonableness" has no place in interpreting exemptions is pointed up by the results which it reached in this case. If anything is well settled under the Act it is that central office employees of chain systems are not within the Section 13 (a) (2) exemption. The holding below, however, not only exempts the employees at Alameda, even though the business there performed is not "retail" in nature, but it also exempts the employees employed at the central office which services Alameda and the other warehouses comprising the East Los Angeles Division.[7] And in time the holding would extend the "retail establishment" exemption still further to include the employees at the Figueroa warehouse establishment which is fast becoming a record storage center.

In applying its "rule of reasonableness," the trial court was persuaded by the testimony offered by appellee to show that its East Los Angeles Division

[7] At the present time, however, no compliance problem is indicated with respect to the central office employees.

Office keeps records, including the payrolls and financial statements, for the warehouses in the Division as a whole, purchases all supplies for the warehouses, maintains a single shop for the repair of all trucks, and employs a single sales force to secure business for the various warehouses. But the fact that appellee has found it efficient and economical to organize its enterprise into divisions so that most of the administrative, sales and executive functions are centralized in a single office for a designated group of warehouses, is irrelevant and immaterial in determining whether any one of the warehouses is an "establishment." Centralization of executive, administrative, accounting, personnel management, purchasing, sales and advertising functions is one of the principal features of the chain system of operation.[8] Such centralization, moreover was present in *Phillips,* but nowhere in the decision did the Supreme Court intimate that organizational structure should be taken into account,

[8] Authorities in the field of marketing agree that centralization of management and common functions is the principal characteristic of a chain organization. The following quotation is typical of their view:

"The structure of the chain system is usually based upon the theory that common functions should be performed, with very minor exceptions, in the central headquarters and that the central office should exercise a large measure of control over the activities of the local units. The chain store system is therefore generally made up of three elements: a central office or headquarters, a group of retail outlets, and a liaison organization functioning between the two. * * *

"(1) Buying. Most chain systems do the bulk of their buying centrally. * * *

* * * * * * *

"(3) Advertising. Most chain systems use some form of advertising as a selling device. * * * The preparation of the mate-

let alone be held controlling, or that a "rule of reasonableness" should be applied in determining what constitutes an "establishment." On the contrary, the Court specifically rejected the contention that the *Phillips* enterprise, organizationally similar to appellee's East Los Angeles Division, was a single establishment. Implicit in the decision, and those following it, is the holding that the organizational structure of a multi-unit enterprise has no bearing on the question whether its units are separate "establishments" under Section 13 (a) (2) of the Act.

In the court below, appellee relied on *Burhans* v. *Montgomery Ward & Co.,* 110 F. Supp. 184 (S. D., N. Y., 1952), which was decided on the basis of a factual situation completely different from that involved here. The "establishment" issue there arose in connection with a single warehouse serving a single retail store. The store, located in Menands, New York, a suburb of Albany, had outgrown the physical

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rial and the purchase of space are usually handled by the central management. * * *

* * * * * * *

"(5) Records and Reports. The accounting work of a chain system is usually carried or very closely supervised by its central headquarters. The accounts constitute one of the chief devices through which control of the various units can be exercised. * * *

"(6) Personnel. Although many of the small chain organizations maintain no formal personnel department, most of the sectional and national systems include such divisions in their central or district headquarters establishment. * * *" Alexander, Surface and Alderson, *Marketing*, Ginn and Co., Boston (3d ed. 1953), pp. 162–165; see also Phillips and Duncan, *Marketing: Principles and Methods*, Richard D. Irwin, Inc., Chicago (Rev. ed., 1952), pp. 160–161; Converse and Jones, *Introduction to Marketing*, Prentice-Hall, New York (1948), p. 209.

capacity of its building and was unable to obtain sufficient space in a contiguous building. It, therefore, acquired a warehouse, located about a mile away. The newly acquired warehouse was to, and did, serve only the one store. The court held that it was a part of the retail store and, therefore, not within the *Phillips* rule. In so holding, the court rested its decision on its findings that the warehouse was "to supplement and complete the functions of the retail store," and that it "in effect operated as a part of the retail store." 110 F. Supp. at 196.

Obviously, the rationale of the *Burhans* case does not apply here where there are five warehouses, each of which is a distinct place of business, and no one of which is functionally an adjunct to a single retail outlet.

Apparently, however, the trial court accepted the rationale of the *Burhans* decision because it theorized that appellee's East Los Angeles Division "could carry on the operations there as well or better if all of its business were carried on in a single large building instead of five buildings geographically separated" (Fdg. 16, R. 42). This "finding" is based on the completely erroneous premise that the business of appellee's original warehouse (Alameda) outgrew the structure, and that the other warehouses were acquired to take care of the overflow. The record conclusively shows that the four warehouses which, together with Alameda, comprise the East Los Angeles Division, were acquired pursuant to appellee's policy of keeping up with the development of new and prosperous residential areas. Thus, in Finding

No. 15 (R. 40–41), the trial court carefully recounted the historical development of appellee's East Los Angeles Division and found that when Alameda was built in 1898 it "was in the center of a prosperous residence area"; that when Figueroa was built, between 1907 and 1913, it "was adjacent to the leading residence area * * * then along South Figueroa Street"; that when Crenshaw was built in 1927, it was "to serve the new residence areas in its area, particularly the Leimert Park Area"; that when Wilshire was acquired in 1931, it "served the prosperous Wilshire residence area"; and that when the Grand Avenue warehouse was acquired in 1942, it was "to meet unusual requirements for space for storage of household goods resulting from World War II."

And in its oral opinion, the trial court expressly recognized that it was the expansion of Los Angeles to the south and to the west which led to the construction or acquisition of the additional warehouses (R. 140). Its speculation, therefore, that the business of appellee's East Los Angeles Division could be carried on as well or better in a single large building is thus completely refuted by its own findings as to why the various warehouses now comprising the Division were acquired. But quite apart from this, this Court has expressly held that in cases under this Act, "it is not what could have been the fact, but what actually was the fact, upon which the decision must rest." *Consolidated Timber Co.* v. *Womack,* 132 F. 2d at 107 (C. A. 9).

In the court below, appellee contended that the *Phillips* doctrine applies only to organizations which

operate a chain of stores and not to those which operate a chain of van and storage warehouses. Plainly, the *Phillips* doctrine cannot be so limited. Indeed, as we have shown, the courts have refused to limit it to the typical retail chain-store situation, but have applied it in cases involving various types of multi-unit enterprises—a building and supply company (*McComb* v. *W. E. Wright Co., supra*); a commissary company operating refreshment stands in railroad stations (*Armstrong Co.* v. *Walling, supra*); a candy kitchen located in the same building as the selling outlet which it served (*Fred Wolferman, Inc.* v. *Gustafson, supra*); and a printing plant adjacent to a stationery store (*McComb* v. *Casa Baldrich, Inc., supra*).

Also, it has been the consistent administrative position that the term "establishment" means a "physically separate unit" of *any* multi-unit company. This position was outstanding when the Supreme Court decided *Phillips* and approved the interpretative bulletin which then contained it.[9] It was also outstanding when the Act was amended in 1949 and Congress approved the *Phillips* doctrine and, in addition, provided in Section 16 (c) of the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 916 (c))

[9] See old Interpretative Bulletin No. 6, paragraph 18 (1940 Wage-Hour Manual, p. 154, at 157): "The question has been raised as to the scope of the term 'establishment' in the case of chain-store systems, branch stores, groups of independent retailers organized to carry on business in a manner similar to chain-store systems, and retail or service outlets of large manufacturing or distributing concerns. In the ordinary case, each physically separated unit or branch store will be considered a separate 'establishment' within the meaning of the exemption."

that all administrative interpretations in effect at the time and not inconsistent with the Amendments "shall remain in effect." [10]

As stated above, the *Phillips* doctrine was expressly approved by Congress when the Act was undergoing amendment in 1949. While, as *Phillips* points out, the legislative history of the original "retail establishment" exemption made it clear enough that the exemption was not intended to apply to an entire business or enterprise (see 324 U. S. at 496–497), any possible doubt about this was completely dispelled by the 1949 amendments. Thus, in its consideration of the amendments, Congress specifically approved the Supreme Court's interpretation in the *Phillips* case of "establishment," the key term of the exemption. See the Statement of a Majority of the Senate Conferees that the *Phillips* definition of "establishment" as "a physically separate place of business" was to be retained (95 Cong. Rec. 14877):

[10] The position, now found in 29 CFR 1954 Supp., 779.3 (b) is expressed as follows: "The term 'establishment' as used in section 13 (a) (2) * * * means a distinct physical place of business. The term is not synonymous with the words 'business' or 'enterprise' as applied to multi-unit companies. Such business organizations operate a number of establishments, some of which may qualify for exemption and some of which may not. * * * Each physically separate place of business must be considered as a separate establishment. Thus, in the case of chain-store systems, branch stores, groups of independent stores organized to carry on business in a manner similar to chain-store systems, and retail outlets operated by manufacturing or distributing concerns, each physically separated unit or branch store will, in the ordinary case, be considered a separate establishment within the meaning of the exemptions."

> * * * Under the present law (*Phillips* v. *Walling* (324 U. S. 490)) a retail establishment means a physically separate place of business which possesses the characteristics of a retailer and does not mean an entire business enterprise. The conference agreement in no way changes the meaning of the term "establishment."

The Statement of the House Managers reemphasized this point (95 Cong. Rec. 14932):

> Paragraph (2) of Section 13 (a) of the conference agreement does not exempt large mail-order houses which make most of their sales to out-of-State customers. Nor does it exempt warehouses and central offices of chain-store systems. The employees in such warehouses and central offices are not employed "by" any single retail or service establishment in the chain but rather by the chain itself.

And Senator George, one of the sponsors of the amendment to Section 13 (a) (2), made the same point (95 Cong. Rec. 12579):

> * * * I wish to say that the word "establishment" has been very well defined in the Wage and Hour Act. It means now a single physically separate place of business which possesses the characteristics of a retailer and it does not mean an entire business enterprise.

Similarly, Senator Holland, also one of the main sponsors of the amendment, specifically explained that "there is no intent in the proposed amendment to change" * * * "the holding of the United States Supreme Court in *Phillips* v. *Walling* (324 U. S. 490)" (95 Cong. Rec. 12505).

CONCLUSION

It is overwhelmingly clear that *Phillips* is controlling on the issue of law in this case. The cases decided thereunder, the legislative history of the 1949 Amendments to the Act, and the consistent administrative interpretation all compel this conclusion. The decision below is incorrect on both the facts and the law. Accordingly, the judgment should be reversed.

Respectfully submitted.

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MAY 1955.

APPENDIX

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fair Labor Standards Act, Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 et seq., as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U. S. C. Supp. V 201 *et seq.,* are as follows:

SEC. 13 (a). The [minimum wage and overtime] provisions * * * shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

* * * * *

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided,* That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

Extract from the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U. S. C. sec. 201):

> SEC. 16. (c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation or agreement of the Administrator or the Secretary as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

U. S. GOVERNMENT PRINTING OFFICE: 1955